



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 5, 1991

Mr. Philip W. Barnes
Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR91-551

Dear Commissioner Barnes:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 13742.

You have received a request for information relating to surplus notes. Specifically, the requestor seeks

1. A list of all the companies in the state of Texas for which the use of surplus notes has been approved in the past two years. I also would like to know all companies that are using surplus notes in Texas
2. All information regarding pending requests for surplus notes. Our office is quite interested in any future approval of surplus notes at the Board level and wants to see copies of all applications for surplus notes. . . .
3. Copies of any procedures or rules being drafted by the agency for implementation for HB 62's new regulation of surplus debentures.

4. A copy of your response to Congressman Dingle regarding his questions about Consec.

You advise us that some of the information will be made available to the requestor, specifically, information requested in item 1 and the first sentence in item 2. You claim, however, that the remaining information is excepted from required public disclosure by section 3(a)(11) of the Open Records Act. You also claim that some of the request constitutes a standing request for information to be collected or prepared in the future. A governmental body need not comply with a standing request to provide information "on a periodic basis." Open Records Decision No. 465 (1987) at 1 (copy enclosed). Accordingly, information requested in the second and third sentences of item 2 not in existence at the time the request was made need not be disclosed.

Section 3(a)(11) excepts from required public disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency." The test under section 3(a)(11) is whether inter-agency or intra-agency information consists of advice, opinion, or recommendation that is used in the deliberative process. Facts and written observation of facts and events, when such information is severable from advice, opinion, or recommendation, cannot be withheld under section 3(a)(11). *See generally* Open Records Decision No. 213 (1978). As for drafts, Open Records Decision No. 559 (1990) (copy enclosed) held that

where a document is genuinely a preliminary draft of a document that has been released or is intended for release in a final form, the draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. In such an instance, the draft itself, as well as comments made on the draft, underlining, deletions, and proofreading marks would qualify for exemption under section 3(a)(11). Purely factual matter, where severable, must be released.

Open Records Decision No. 559 (citing from the summary).

You assert that the requested information includes "procedures or rules which are currently being drafted by agency staff" and that such drafts "constitute the preliminary recommendations of the agency's staff, which are being used in the course of deliberations regarding the implementation of new regulations." Such information, you claim, is excepted by section 3(a)(11). We have examined the draft document titled "DEBENTURE RULES" submitted to us for review and conclude that it may be excepted in its entirety from required public disclosure under section 3(a)(11). The letter to Congressman Dingle, however, contains mostly factual information which may not be excepted under section 3(a)(11). However, the information that we have marked includes advice, opinion, and recommendation and thus, may be withheld from required public disclosure under section 3(a)(11).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-551.

Yours very truly,



Celeste A. Baker
Assistant Attorney General
Opinion Committee

CAB/GK/lcd

Enclosures: Documents
Open Records Decision No. 465, 559

Ref.: ID#s 13742, 13957

cc: Ms. Amy Johnson
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